NO. COA07-523
NO. COA07-642

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

FLORINDA CHILDERS JOHNSON,
Individually and as
Executrix of the ESTATE OF
EDWARD GILBERT JOHNSON, SR.,
Plaintiff

Durham County
No. 06-CVS-04077

v.

EDWIN J. WALKER, JR., and
WALKER & LAMBE, P.L.L.C.,
Defendants

Appeal by plaintiff from orders entered 20 February 2007 by Judge Henry W. Hight, Jr. and 17 April 2007 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 14 November 2007.

Elliot Pishko Morgan, P.A., by David C. Pishko, for plaintiff-appellant.

Poyner & Spruill LLP, by E. Fitzgerald Parnell, III and Cynthia L. Van Horne, for defendant-appellees.

HUNTER, Judge.

Florinda Childers Johnson ("plaintiff") appeals from an order granting summary judgment to Edwin J. Walker, Jr., and Walker & Lambe, P.L.L.C. ("defendants") and from an order taxing plaintiff with certain costs of the appeal. As the issues presented in the appeals involve common questions of law, we have consolidated the

appeals for purposes of decision. After careful review, we reverse the order granting summary judgment and therefore also reverse the award of costs.

I.

On 10 May 1998, Edward Gilbert Johnson, Sr. ("the decedent"), executed a will in the state of Georgia naming as beneficiaries both his wife, plaintiff in this action, and his two sons. Plaintiff was one of two witnesses to the will. In May 2005, the decedent came to North Carolina to receive treatment for liver cancer at Duke University Medical Center in Durham. Prior to admission to the hospital for that treatment, on 9 May 2005, he contacted defendant Walker for legal advice regarding the validity of the will executed in Georgia. The decedent and Mr. Walker then discussed the will over the telephone; what actually occurred during that discussion is disputed. Mr. Walker and the decedent then scheduled an appointment to meet on or about 13 June 2005, which the decedent then canceled. The decedent was admitted to the hospital on or about 14 June 2005 and died on 29 June 2005 without being in further contact with Mr. Walker.

Because plaintiff was a witness to the will, per N.C. Gen. Stat. § 31-10(a) (2005), she could take nothing as a beneficiary under the will. The provisions of the will relating to plaintiff were therefore void under North Carolina law. Plaintiff filed a declaratory judgment action against the decedent's two sons on 21 November 2005 to distribute the assets of the decedent's estate; that action was settled, ending in her receiving a cash

distribution of $111,542.00 and a lifetime interest in a trust valued at $1,963,546.00. Plaintiff then brought this suit against defendants for legal malpractice.

Defendants moved for summary judgment, which was granted by trial court order on 20 February 2007. That order is the subject of plaintiff's first appeal.

On 17 April 2007, the trial court entered an order granting defendants' motion to tax costs against plaintiff. That order is the subject of plaintiff's second appeal.

II.

A.

Plaintiff argues that she forecast sufficient evidence to show that defendants' actions as to the decedent constituted a breach of duty. We agree.

Summary judgment is appropriate when there are no genuine issues of material fact and any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). "The moving party has the burden of establishing the lack of any triable issue[.]" *Gregory v. Floyd*, 112 N.C. App. 470, 473, 435 S.E.2d 808, 810 (1993). He may meet this burden "'by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]'" *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (citation omitted). The elements of the claim of professional malpractice based on negligence by an

attorney are: "(1) that the attorney breached the duties owed to his client, . . . and that this negligence (2) proximately caused (3) damage to the plaintiff." *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985).

Two diametrically opposed versions of the facts are presented here: (1) Per defendant, the decedent wrote asking him to examine certain portions of his will to determine whether they would carry out his intent as spelled out in the note. Quickly realizing those portions would not carry out that intent, defendant called the decedent and told him he would have to compose a new will, but the decedent did not get back in touch with defendant to follow through. (2) Per plaintiff, the decedent contacted defendant to ask about the validity and practical impact of his will, and after examining four pages of the ten-page will, defendant called the decedent and said the will looked fine.

Before breach of duty can be established in this case, defendant's duty to his client must be established, as must his actions after accepting that duty. Thus, certain crucial facts must be determined: The scope of defendant's representation and the nature of the information defendant gave the decedent on the phone. As stated above, the parties have presented contrasting information as to these material facts.

The question, then, is whether a genuine issue regarding those material facts exists. We believe that such an issue exists.

Defendant's attorney makes much of the fact that plaintiff admitted in an email to her attorney that defendant was not asked

to assess the will's validity, and thus his responsibility was limited only to assessing certain clauses of the will. However, if taking plaintiff's version of the facts as true, even if all defendant was *explicitly* asked to do was determine whether the will accomplished certain financial objectives, defendant's failure to read the will in its entirety and notice that it was clearly executed improperly under North Carolina law would breach that duty, as an invalid will would not accomplish the objectives the decedent had set out. We note that, according to defendant Walker's deposition, the decedent was billed for $320.25 for defendant Walker's services, including one hour for review of the will and discussion with the decedent about it.

Further, expert witnesses have been presented by both parties, and those witnesses, each having heard the version of the facts in the light most favorable to their own party, have drawn opposite conclusions. This is strong evidence that the disputed facts are material to this appeal.

Thus, genuine issues of material fact exist in this case, and as such summary judgment should not have been granted. We therefore reverse the trial court's grant of that order and remand.

B.

Defendants argue two alternate grounds for the summary judgment order; both of these arguments are without merit. First, they argue that they forecast sufficient evidence of the decedent's contributory negligence; however, due to the above-discussed disputed facts, this Court cannot say as a matter of law that such

contributory negligence exists, and as such this is a matter for a jury. *See Stallings v. Food Lion, Inc.*, 141 N.C. App. 135, 138, 539 S.E.2d 331, 333-34 (2000). Second, defendants argue that the doctrine of election of remedies bars plaintiff's claims because she has entered a settlement agreement with the other claimants to the decedent's estate. However, this Court has rejected precisely this argument in an earlier case. *See McCabe v. Dawkins*, 97 N.C. App. 447, 448, 388 S.E.2d 571, 572 (1990) (holding that declaratory judgment action brought by executor to interpret will, resulting in settlement, was not an election of remedies, and thus executor could bring suit for legal malpractice against attorney for negligent will drafting). As such, we overrule these arguments.

III.

Plaintiff argues that the trial court granted in error defendants' motion for "deposition and mediation" costs in the amount of $1,820.10. Because we reverse the order above, however, we must also reverse this order granting costs, as the case will now be returning to the trial court for trial.

IV.

Because genuine issues of material fact exist, we reverse the trial court's grant of summary judgment and the order awarding costs and remand this action to the trial court.

Reversed and remanded.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).